pots of Cambridge. Perhaps we shall get relief from the Field Code, which begins to loom up with terrible distinctness, and already poses as the layman's panacea and the lawyer's dragon. Some of us believe that it will prove a boomerang. Even the Statute of Frauds, it will be remembered, has required interpretation. But I digress, and forget that my subject is a question of privity, while with this code it can never be a question of consideration.

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THE RESPONSIBILITIES OF AMERICAN LAWYERS.

IT is one of the popular fallacies of the present day that the responsibility for the state of the law rests entirely with the legislative branch of the government. In reality, this responsibility is in every country shared to a great extent by the legal profession, and the slow development of the law, which results from the writings of jurists, the judgments of courts, and the customary practice of lawyers, is, perhaps, more irresistible, because less noticed, than the violent changes produced by direct legislation. This is especially true in countries where the decisions rendered in actual cases furnish the main source of legal authority. It is not, however, the general responsibility of lawyers in lands where the common law prevails that I wish to consider. It is the more restricted but more weighty duty which is laid upon the legal profession in America by the peculiar nature of our system of government.

The immense power given to the courts by our constitutions is so familiar to us that remark upon it has become commonplace, and for that very reason we sometimes fail to realize its true significance as fully as does the foreigner to whom it is a subject of astonishment. We are in the habit of speaking of our political system as a government by the people, carried on by means of three coördinate branches,— the Executive, the Legislative, and the Judicial; but when these expressions are examined carefully, it is evident that they are misleading, and, perhaps, inaccurate, at least in the

sense in which they are commonly understood. These three branches, in the first place, are called coördinate, and work each in a separate and defined province; and yet, as must of necessity be the case in human affairs, the lines of demarcation are not always clear, and unless confusion is to be endless, a power must exist somewhere to determine the limits of the separate provinces, and to decide controversies in regard to them. The power to do this has been confided to the courts in accordance with the principles of the common law, if not by the express provisions of the Constitution. The judicial branch of the government, therefore, is the final arbiter and ultimate authority on all matters touching the limits of the powers granted by that instrument. It possesses no direct initiative, but it is the sole and final judge of its own rights as well as of those of the Executive and the Legislature, and in this sense, while greatly inferior in force, it is superior in authority to the other two branches of the government.[1]

Now let us consider for a moment the nature of the body in which this vast power is vested. The Executive and Legislature are elected by the people, or by some rough approximation to a

[1] An extended discussion of the effect which a decision by the Supreme Court on a point of constitutional law has upon the other branches of the government would not be appropriate in this article; but as I have to some extent assumed the correctness of one side of a controversy upon the point, a few words of explanation in a note may not be out of place. A decision by the highest court of appeal has two distinct effects. In the first place, it is absolutely and finally binding on the parties to the suits and all persons claiming under them, and it is binding on no one else. In the second place, it establishes a precedent which, under ordinary circumstances, is morally certain to be followed whenever the same question is again presented to the court; and it is in consequence of this second effect of a decision that the court has virtually power to settle the law. Now, in the United States, all officers of the government are subject to the ordinary rules of the common law (with a few exceptions, in some States, for example, of soldiers called out to suppress a riot, etc.), and although the courts have no general power to command the performance of official duties, yet a public officer can be sued or prosecuted for violations of the law like any other citizen, and his official position or the orders of his superior are no defence to him. If he has done any act in excess of his authority, he is liable for it precisely as any one else who had done the same act would be; and it is for the ordinary courts of common law to decide whether the act in question is beyond his authority or not. If, therefore, the court has decided that a certain statute is unconstitutional, every one knows that he may treat that statute as invalid. He knows that the court will give him redress against any person, whether public officer or private citizen, who injures him under color of its provisions; and he knows that he may resist any officer or other person who attempts to enforce it, and that he will be held harmless for so doing. In many of the continental countries of Europe a public officer is not amenable to the ordinary process of law, either by virtue of a provision that he cannot be sued or prosecuted in the ordinary courts, on account of any act done under color of his office, without the consent of a

majority of the people, and, in a general way, they are expected to carry out the wishes of their constituents; but the Courts stand in a very different position. They are not in any ordinary sense of the word the representatives of the people, and it is not their mission to enforce the popular will. To some extent, it is true, the opinion has prevailed that the judges, like all other public servants, ought to depend for office upon popular esteem or approval; and in many States laws have been accordingly passed providing that they shall be elected by the people for limited terms. But, happily, the influence of such ideas appears to be on the wane, for the lengthening of the terms for which judges are chosen, and the provisions forbidding reëlection, seem to indicate a return to a moral rational view of the functions of the judiciary. If, indeed, it were the duty of the courts to give effect to the wishes of the people upon constitutional questions, our government would be a truly absurd one. The judicial body would then be a sort of additional legislature extremely ill-fitted for its task. But, in fact, the duty of the courts is almost the reverse of this, because the popular desire for a law may very well be presumed from the fact

council composed of his official superiors, or because his acts are cognizable only by special administrative tribunals; and where this is true, it is clear that the judiciary cannot by their decisions bind the other branches of the government. There is, in those countries, one law for the citizen and another for the public servant; and, in fact, the rights and duties of the latter are regulated by a vast body of special law known as the *droit administratif*, which falls entirely outside the jurisdiction of the ordinary courts. By this means the Executive has been made really independent of the judiciary.[1] But nothing of this kind is true in the United States. There is here only one law, administered by one set of tribunals, to whose jurisdictions every one is subject. It follows that the law administered by the courts is the one law of the land, binding on all persons and all branches of the government. This must of necessity be the case so long as public officers are by law and in fact amenable to the ordinary process of the courts, and it is as true of constitutional as of the common law, so far, at least, as the rights of individuals are concerned. The fact is that a great deal of confusion is introduced into this subject by regarding the provisions of the Constitution as a statement of political maxims, instead of a source of positive law. If it is admitted (what no one now attempts seriously to deny) that the Constitution is in effect a law enacted by a body of higher legislative authority than Congress, the question is really cleared of most of its difficulty, for no one doubts that the Executive is bound by a judicial construction of a statute.

The statements in the text must, of course, be understood with the qualification that the courts have authority to determine the limits of the powers granted by the Constitution only when the question is presented in actual litigation. But as there is no question of this sort which may not arise in an actual case, the qualification does not impair the correctness of the statement.

[1] This matter is admirably treated in A. V. Dicey's "Law of the Constitution," London, 1885.

that it has been passed by the Legislature, and the courts are given power to treat a statute as invalid in order that they may thwart the popular will in cases where that will conflicts with the provisions of the Constitution. Now, the Constitution is always older than the law in question, and may be more ancient by a century, so that the court, in deciding that a law is unconstitutional, declares, in effect, that the present wishes of the people cannot be carried out, because opposed to their previous intention, or, perhaps, to the views of their remote ancestors. Of course all our constitutions have a safety-valve in the power of amendment, so that any of them can be changed by a sufficient proportion of the voters, if they persist long enough in the same opinion ; but this, while modifying, does not do away with the fact that it is often the duty of our courts to defeat the immediate wishes of a majority of the people. Stated in such a form, the power of our judiciary is certainly very startling ; and it is even more surprising that a power so extensive should have been placed in the hands of a small number of men, chosen exclusively from one profession, and that among a people who are jealous of the influence of all associations and professions, and who are impatient of authority of every kind. The truth is that our fathers, while admitting the right of the majority to govern within certain limits, believed that there were principles more important than the execution of the popular will, and rights which ought not to be violated by the impulse and excitement of a majority ; and the constitutional provisions established by them remain in force to-day, because we still believe in the sacredness of the principles which they preached. These principles stand on the same ground as moral precepts. The restraints they place upon us are not always agreeable, but we continue to uphold them, because we believe in their inherent righteousness and in their importance to the well-being of the world. The duty of watching over and guarding these fundamental principles, — these legal morals, if I may be allowed the term, — of developing, explaining, and defending them, rests with the legal profession ; and if this is true, it is surely difficult to overestimate the responsibility of lawyers in America.

I have said that the constitutional principles taught by our fathers retain their force to-day because we still believe in them ; but the statement may, perhaps, require some explanation. For a long time the Constitution of the United States was the object of what had been called a fetish worship ; that is, it was regarded

as something peculiarly sacred, and received an unquestioned homage for reasons quite apart from any virtues of its own. The Constitution was to us, indeed, what a king has often been to other nations, — it was the symbol and pledge of our national existence, and the only object on which the people could expend their new-born loyalty. Let us hope that such a feeling will never die out, for it is a purifying and ennobling one; but to-day our national union is entirely accomplished, and we need no symbol or pledge to assure us of the fact. We can no longer expect, therefore, the blind veneration for our Constitution which prevailed in the first decades of the century. This is a time when all forms of government are being put to the test, and our own must approve itself by the excellence of the principles upon which it is built. At the present moment the power lodged with the courts appears, it is true, to be the most stable feature of our government; and, in fact, we are so accustomed to see judicial decisions readily accepted and implicitly obeyed, that we cannot help attributing to them a mysterious intrinsic force. We are naturally in the habit of ascribing to the courts a sort of supernatural power to regulate the affairs of men, and to restrain the excesses and curb the passions of the people. We forget that no such power can in reality exist, and that no court can hinder a people that is determined to have its way. In short, that nothing can control the popular will except the sober good sense of the people themselves. One has only to turn his eyes to France to see the truth of this statement. That country has had a dozen constitutions, each as sacred as such an instrument can be, but they have all been short-lived, and no one supposes that their frail existence could have been preserved by granting to the French courts the powers possessed by our own. The cause of such a state of things is obvious. The French constitutions are the work of a party, and the people at large are more anxious to accomplish their immediate aims than to maintain the theoretical doctrines embodied in these instruments. The reverse of this is true here, and it is because our people care more for their Constitution than for any single law enacted by the legislature that constitutional government is possible among us. So long as such a feeling continues, our Constitution and the power of our courts will remain unimpaired; but if at any time the people conclude that constitutional law, as interpreted by lawyers, is absurd or irrational, the

power of the judiciary will inevitably vanish, and a great part of the Constitution will be irretrievably swept away. Our constitutional law depends for its force, therefore, upon the fact that it approves itself to the good sense of the people; and the power of the courts is held upon condition that the precedents established by them are wise, statesmanlike, and founded upon enduring principles of justice which are worthy of the respect of the community.

How, then, it may be asked, are the courts to make their decisions respected and approved by the people? By catching the current of popular opinion and leaning towards that interpretation of constitutional questions which the wants of the day appear to demand? By no means. Such a course is of all the best calculated in the long run to bring the judiciary into disrepute, for it makes of them a political instead of a legal body. To suggest it shows an entire want of appreciation of the genius of our people; and, in fact, the cases in which the bench has suffered the greatest loss of influence have been those in which it has allowed popular excitement, or party prejudice, which is really the same thing, to affect its opinions. What is needed to maintain the esteem in which the courts are now held is a careful study of the principles established by the Constitution, and a clear development of the theories of constitutional law; not theory in the narrow sense of something contrasted and often irreconcilable with practice. Theory in this sense is nothing more than a set of doctrines, at best the logical result of premises more or less inaccurate. It is extremely easy to manufacture, and is justly an object of suspicion to the community. But what we need in the study of constitutional law is theory in a higher sense. We need that ripe scholarship which regards theory as truth stated in an abstract form, to be constantly measured by practice as a test of its correctness; for theory and practice are in reality correlatives, each of which requires the aid of the other for its own proper development. It often happens, when some zealous student propounds a striking doctrine whereby all the problems in the world are reduced to the form of a quadratic equation, that a bystander remarks: "That may be all very well in theory, but it will not work in practice." This saying is a very common one, but it is founded on a most pernicious error, for either it uses the word "theory" in the ridiculous sense of something which ought to be true, and would be true if the world were properly constructed, or else it assumes

that a theory may be correct although inconsistent with the facts or practice which it attempts to explain; whereas in reality a theory which does not agree with the facts, or will not work in practice, is simply wrong. A practice, on the other hand, which is not guided and enlightened by abstract or theoretical study is short-sighted, unprogressive, and extremely likely to be based upon a blunder.

It may seem to the reader that there is no danger of falling into either of these errors in the study of constitutional law, but a careful review of the decisions on the subject, especially those to be found in some of the State reports, will convince him that the judges have been constantly falling into one or the other of these pitfalls, and sometimes, strange as the feat may appear, into both of them at the same time. There are many decisions in which the court evidently had no principle of general application in mind at all; others where the opinion is based upon some high-sounding but entirely inaccurate generality, which, if literally applied, would overrule half the cases and upset the whole fabric of constitutional law; and there are not a few cases in which the generality is enunciated with solemn gravity, while it is perfectly clear that it had nothing to do with the decision, which was determined by the judge's general impression of the case. Let me not be supposed to apply any of this language to the decisions of our great constitutional lawyers. On the contrary, I have the highest appreciation of the labors of these men, and I feel that their country owes them an eternal debt of gratitude. Marshall, indeed, who set the tone for his successors, combined the wisdom of the philosopher with the good sense of the magistrate, and it is precisely because these qualities are so rarely united that I wish to insist on the importance of both of them, and to signalize the evils which may flow from the absence of either.

Those persons who regard the provisions of the Constitution, and particularly the ones designed to protect the rights of the individual, not as a mere collection of arbitrary rules, but as a set of principles adapted to promote the happiness and prosperity of the people, will find it easy to believe that these principles, clearly expounded and wisely applied, cannot fail to retain their hold upon the respect of the citizen.

A careful study of constitutional law is especially important at this time, because the fourteenth amendment to the Constitution of

the United States has furnished an opportunity for a review of the decisions of the State courts upon a most important branch of the law. The first ten amendments to the Constitution, including the provision that no one shall be deprived of life, liberty, or property without due process of law, were adopted, as it was early settled, solely for the purpose of limiting the power of Congress. They imposed, therefore, no restraint upon the legislative power of the several States; and as Congress found few occasions to violate this provision, the federal judges were seldom required to put a construction upon it. The State Constitutions, however, contain similar clauses, and the State courts have had abundant opportunities to interpret them. Now, the fourteenth amendment, adopted after the close of the civil war, contains a provision extending the same limitation to the power of the several States, and in this way the acts of the State legislatures which are supposed to violate the rights thereby secured have been drawn within the jurisdiction of the courts of the United States. The great branch of constitutional law, therefore, which depends upon this important part of the Bill of Rights is now being reviewed by the federal judges, who are not bound by the decisions made in the State courts, and yet have the benefit of the experience of a century.

What I have said may appear to touch only the judges, and to have no application to the profession at large. But, in the first place, it must be remembered that the judges are selected from the ranks of the profession, and that in the long run their views upon the importance of constitutional law, and their sense of the great responsibility of their position, must be derived mainly from the profession in which they were bred. It is not, however, only as the great mother of judges that the legal profession is involved in this responsibility. Every lawyer may become engaged in suits turning upon points of constitutional law. He then finds himself arguing questions which among other nations are determined by a popular assembly or parliament of the realm. He argues, moreover, before a court whose decision becomes a precedent, often more difficult to shake than any act of Parliament. Every American lawyer is, in a sense, therefore, a statesman by virtue of his profession, and may at any time find himself called upon to take part in deciding questions destined to leave a lasting mark upon the government of his country. His position, it is true, differs in one very

important respect from that of a member of Parliament, for he appears on the side which he is retained to represent, and not on that which he believes to be right,—a state of things which it is useless to try to explain to a layman, and which to a lawyer needs no explanation. And yet even the layman may be ready to grant that an exalted sense of the importance of the subject, broad views, and a strong grasp of constitutional principles, on the part of the advocates, cannot fail to have a very great effect upon the decision of the court.

Some cynic, who has had the patience to read so far, will, no doubt, remark that the legal profession is not a charitable institution, and that men practise law to get money, and support themselves, and not from philanthropic motives. To this I answer that no profession can be great unless the money-making aims of the individual are leavened by a sense of the importance of his vocation and of the dignity of the body that pursues it. A man who is unconscious of the strength of the *esprit de corps* of a great profession, of its power to inspire its members with a high and noble ambition, and to make itself an end and not a mere means of making money; a man who has never felt this has failed to appreciate one of the most valuable of human qualities,—he has only to turn his eyes to the doctors to see its force, and no careful search is required to find it among lawyers. This is the quality which we need to foster, because its influence upon the moral and intellectual condition of the legal profession is great, and because it is upon that profession that we must chiefly rely for the preservation of constitutional principles in this country.

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